

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE: THE BANK OF NEW YORK
MELLON ADR FX LITIGATION

16-CV-00212-JPO-JLC

ECF Case

This Document Relates to:

CONTRACT CLASS ACTION

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION TO SUBSTITUTE DIANA CAROFANO AS A PARTY PLAINTIFF**

Plaintiffs David Feige and International Union of Operating Engineers Local 138 Pension Trust Fund (collectively, “Plaintiffs”) move to substitute Diana Carofano as a Party Plaintiff for her deceased husband pursuant to Federal Rule of Civil Procedure (“Rule”) 25(a)(1).

RELEVANT FACTS

Plaintiff Don Carofano first filed a complaint in this action on January 11, 2016. ECF No. 1. He was a resident of California and had owned, through his personal IRA account, certain Bank of New York Mellon (“BNYM”)-sponsored ADRs. Declaration of Sharan Nirmul In Support of Plaintiffs’ Motion to Substitute Diana Carofano as a Party Plaintiff (“Nirmul Decl.”), ¶¶ 2-3. Mr. Carofano’s wife, Ms. Diana Carofano, was the sole beneficiary of this IRA account. *Id.*, ¶¶ 2, 4, 7 & Ex. 1 (Carofano Tr. at 44:13-16; 19:24-20:5). On or about December 27, 2017, Mr. Carofano was involved in a fatal car accident. *Id.*, ¶ 5. Ms. Carofano was also involved in the car accident on December 27, 2017. *Id.*, ¶ 6. Ms. Carofano informed counsel of Mr. Carofano’s death on or about March 8, 2018. *Id.* Ms. Carofano is the sole executor of Mr. Caorfano’s estate. *Id.*, ¶ 7. Plaintiffs filed a Suggestion of Death on April 19, 2018. ECF No. 111. Ms. Carofano has retained counsel to press the claims Mr. Carofano originally brought in a representative capacity. Nirmul Decl., ¶ 11. On May 15, 2018, Plaintiffs moved for certification of two classes under Rule 23. Ms. Carofano was put forth as a prospective class representative for both classes in that motion. ECF. No. 118. Ms. Carofano, through the IRA, continues to own certain BNYM-sponsored ADRs. Nirmul Decl., ¶ 9.

ARGUMENT

Substitution of a party in the event of death is governed by Rule 25(a). It provides in relevant part, “if a party dies and the claim is not extinguished, the court may order substitution of the proper party.” FED. R. CIV. P. 25(a)(1). Such a motion “may be made by any party or by the decedent’s successor or representative.” *Id.* The motion must be “made within 90 days after

service of a statement noting death” *Id.* Thus, under the plain language of the rule, there are three requirements for substitution: “(1) the motion is timely, (2) the movant’s claims have not been extinguished by the death of the original party, and (3) the movant is a proper party for substitution.” *Coleman v. Sys. Dialing LLC*, 2016 WL 1169518, at *1 (S.D.N.Y. Mar. 22, 2016).

First, Ms. Carofano’s motion is timely, as it was filed within 90 days of the April 19, 2018 Suggestion of Death. ECF No. 111; FED. R. CIV. P.25(a).

Second, Mr. Carofano’s claims have not been extinguished and survive his death. *See, e.g., Allen v. Devine*, 2011 WL 5117619, at *3 (E.D.N.Y. Oct. 25, 2011) (under New York law, “actions in . . . contract survive the death of a party”).¹

Finally, Ms. Carofano is the proper party for substitution. “It is well established that a proper party under Rule 25 is either a representative of the decedent’s estate or the successor of the deceased.” *Shapiro v. United States*, 2008 WL 4302614, at *1 (S.D.N.Y. Sept. 17, 2008). “A ‘representative’ is defined as a person who has received letters to administer the estate of the decedent, usually the appointed administrator or executor of the decedent’s estate.” *Garcia v. City of New York*, 2009 WL 261365, at *1 (E.D.N.Y. Feb. 4, 2009).

Here, Ms. Carofano, who resides in California, was the sole beneficiary of Mr. Carofano’s IRA, which held and continues to hold BNYM-sponsored ADRs. Nirmul Decl., Ex. 1 (Carofano Tr. at 44:13-16; 19:24-20:5). After his death, the assets from Mr. Carofano’s IRA flowed directly to Ms. Carofano, and were not subject to probate. Nirmul Decl., ¶¶ 7-8; *Garetson v. Garetson*, 2004 WL 1529623, at *5 (Cal. App. July 8, 2004) (citing *Estate of Davis*, 171 Cal. App. 3d 854,

¹ Moreover, this is a class action where Plaintiffs are continuing to press claims on behalf of certain BNYM-sponsored ADRs, including certain ADRs previously owned by Mr. Carofano. Ms. Carofano, as the beneficiary of Mr. Carofano’s IRA, is unquestionably an absent class member in this litigation who continues to have viable breach of contract claims against BNYM in her individual capacity.

856 (Cal. Ct. App. 1985)) (under California law, “on death of depositor, IRA account does not become asset of estate, but passes to named beneficiary”). Ms. Carofano is also the sole executor of Mr. Carofano’s estate. Nirmul Decl., ¶ 7.

Accordingly, Ms. Carofano, as the successor to Mr. Carofano’s IRA and the sole executor of Mr. Carofano’s estate, is the proper party for substitution.

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion to substitute should be granted.

Dated: May 23, 2018

Respectfully submitted,

KESSLER TOPAZ MELTZER
& CHECK, LLP

LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP

By: /s/ Sharan Nirmul
Sharan Nirmul

By: /s/ Daniel P. Chiplock
Daniel P. Chiplock

Joseph H. Meltzer
Sharan Nirmul
Ethan Barlieb
Jonathan F. Neumann
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
Email: jmeltzer@ktmc.com
snirmul@ktmc.com
ebarlieb@ktmc.com
jneumann@ktmc.com

Daniel P. Chiplock
Daniel E. Seltz
Michael J. Miarmi
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Telephone: (212) 355-9500
Facsimile: (212) 355-9592
E-mail: dchiplock@lchb.com
dseltz@lchb.com
mmiarmi@lchb.com

*Interim Lead Counsel for Plaintiffs and the
Proposed Class; Counsel for Diana Carofano*

Elizabeth J. Cabraser
Robert L. Lieff (*of counsel*)
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
Email: ecabraser@lchb.com
rlieff@lchb.com
*Interim Lead Counsel for Plaintiffs and
the Proposed Class*

Frank R. Schirripa
HACH ROSE SCHIRripa & CHEVERIE, LLP
185 Madison Avenue, 14th Floor
New York, New York 10016
Telephone: (212) 213-8311
Facsimile (212) 779-0028
Email: fschirripa@hrsclaw.com
*Counsel for Plaintiff International Union of
Operating Engineers Local 138 Pension Trust
Fund*